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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

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To:

Hon. Mel Flanagan
Milwaukee County Circuit Court
901 N. 9th Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

John Barrett, Clerk
Milwaukee County Circuit Court
821 W. State Street, Room 114
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Russell D. Bohach
P. O. Box 485
Butler, WI 53007

Thomas Steven Welz, #110890
Waupun Correctional Inst.
P.O. Box 351
Waupun, WI 53963-0351

You are hereby notified that the Court has entered the following opinion and order:

2014AP2530-CRNM State of Wisconsin v. Thomas Steven Welz
(L.C. #2011CF4997)

Before Curley, P.J., Kessler and Brennan, JJ.

Thomas Steven Welz pleaded guilty to one count of conspiracy to commit first-degree intentional homicide and one count of intimidating a witness by a person charged with a felony, contrary to WIS. STAT. §§ 940.01(1)(a), 939.31, and 940.43(7) (2011-12).[1] He now appeals from the amended judgment of conviction. Welz's postconviction/appellate counsel, Russell D. Bohach, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

WIS. STAT. RULE 809.32. Welz has filed two responses.[2] We have independently reviewed the record, the no-merit report, and the responses, as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

Welz was charged with four felonies. Three counts involving witness intimidation concerned Welz's attempts to dissuade the mother of his children from testifying against him in a criminal case that alleged Welz had physically abused one of the children.[3] Another count, conspiracy to commit first-degree intentional homicide, alleged that Welz had numerous conversations with a fellow inmate about having the mother of Welz's children killed. According to the criminal complaint, Welz, with that inmate's help, ultimately spoke with an undercover detective about paying $5000 to shoot the woman.

Welz entered a plea agreement with the State pursuant to which he pled no contest to conspiracy to commit first-degree intentional homicide and guilty to one count of intimidation of a witness by a person charged with a felony.[4] The two remaining intimidation counts, plus the single child abuse count in Milwaukee County Circuit Court Case No. 2011CF3108, were

[2] Welz's responses were handwritten. Where we quote from his responses, we have adjusted the capitalization of some words.

[3] As we explain *infra*, that child abuse case, Milwaukee County Circuit Court Case No. 2011CF3108, was ultimately dismissed and read in as part of Welz's plea agreement in the case before this court.

[4] The amended judgment of conviction erroneously indicates that Welz pleaded guilty, rather than no contest, to the conspiracy to commit first-degree intentional homicide charge. Upon remittitur, the circuit court shall direct the clerk of circuit court to enter an amended judgment of conviction that indicates Welz pleaded no contest to count one. *See* ***State v. Prihoda***, 2000 WI 123, ¶5, 239 Wis. 2d 244, 618 N.W.2d 857 (the circuit court must correct a clerical error in the sentence portion of a written judgment or direct the clerk's office to make the correction).

dismissed and read in. The State agreed to recommend "a significant prison sentence," leaving the length of that sentence to the trial court's discretion.

The trial court conducted a plea colloquy with Welz, accepted Welz's no-contest and guilty pleas, and found him guilty. A presentence investigation was ordered and the parties returned to court for sentencing. When the State made its sentencing argument, it confirmed that it was recommending "a significant prison sentence," but the prosecutor later said: "Our public, our community, needs to know that when someone commits offenses like these … they will be held accountable, *to the fullest extent of the law*." (Emphasis added.) In response, trial counsel objected and argued that the plea agreement had been breached. Trial counsel suggested that Welz may be able to withdraw his plea based on the breach. The trial court adjourned the sentencing hearing and directed the parties to provide written arguments on the issue.

Welz's written submission asserted that the plea agreement had been breached and that "when either specific performance of the bargain in front of a new sentencing court or withdrawal of the plea is available as a remedy, as it is here, the remedy is up to the discretion of the court." The State's written submission conceded that it had violated the plea agreement, noting that while it had not intended "to convey that a maximum sentence was warranted," it "cannot ignore how the State's comments could be construed." The State argued that the appropriate remedy would be to have a different judge conduct the sentencing hearing.

At the next hearing, the trial court recognized the parties' agreement that there had been a breach and concluded that rather than allowing Welz to withdraw his plea,

> the more appropriate remedy based on the situation would be to put [Welz] back to square one … which is with your plea agreement and the recommendation that the State had agreed to make before a judge who is unaware of the statements that were made on the record in the sentencing that we began.

In response, trial counsel said that he and Welz had discussed the matter and that Welz preferred to have the case remain with the same trial court. The trial court conducted a colloquy with Welz about his decision and also noted that it did not believe the State's statement at the prior hearing would affect its decision. Welz personally confirmed that he wanted the same trial court to conduct the sentencing hearing. He explained: "I'm more comfortable I think with you…. I talked to my attorney, and I think I'd rather have you, just cut and dry [sic]." The State indicated that it did not object. The trial court accepted Welz's decision and scheduled another sentencing hearing.

The trial court sentenced Welz to ten years of initial confinement and ten years of extended supervision for the conspiracy to commit homicide. It imposed a consecutive sentence of five years of initial confinement and five years of extended supervision for the intimidation count.[5]

The no-merit report analyzes two issues: (1) whether Welz's guilty plea was knowingly, intelligently, and voluntarily entered; and (2) whether the trial court erroneously exercised its sentencing discretion. Welz filed a response to the no-merit report that makes several assertions

[5] The trial court also ordered Welz to provide a DNA sample and pay the DNA surcharge. Upon a motion by postconviction counsel, the trial court subsequently vacated the DNA surcharge.

concerning whether he was actually guilty of conspiracy to commit first-degree intentional homicide and whether he was in the "right frame of mind to take a plea bargain." Later, after this court directed the clerk of circuit court to supplement the record with several letters that were considered by the trial court at sentencing, Welz filed a second response discussing those letters and also questioned whether he was going to have to serve a mandatory life sentence.

This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in the no-merit report, and we independently conclude that pursuing those issues would lack arguable merit. We will briefly discuss the plea and sentencing, including the breach of the plea agreement that occurred at the first sentencing hearing. We will also address the issues in Welz's responses.

We begin with Welz's pleas. There is no arguable basis to allege that Welz's no-contest and guilty pleas were not knowingly, intelligently, and voluntarily entered. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). He completed a plea questionnaire and waiver of rights form, which the trial court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Attached to those documents were the printed jury instructions for the two crimes and conspiracy, as well as the jury instruction for the defense of entrapment. The trial court conducted a plea colloquy that addressed Welz's understanding of the plea agreement and the charges to which he was pleading no contest and guilty, the penalties he faced, and the

constitutional rights he was waiving by entering his pleas.[6] *See* § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72.

The trial court referenced the guilty plea questionnaire that Welz completed with his trial counsel, noting that the jury instructions attached to the form contained the elements of each crime. Welz confirmed that he and his trial counsel discussed those elements and that he was "familiar with what the State would have to prove." The trial court confirmed with Welz that he knew the trial court was free to impose the maximum sentences, and it reiterated the maximum sentences and fines that could be imposed. The trial court also discussed with Welz the constitutional rights Welz was waiving, such as his right to a jury trial and his right to testify in his own defense.

Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form, attached jury instructions, Welz's conversations with his trial counsel, and the trial court's colloquy appropriately advised Welz of the elements of the crimes and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for

[6] WISCONSIN STAT. § 971.08(1)(c) requires the court, before accepting a guilty plea, to:

> Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

(continued)

ensuring that the pleas were knowing, intelligent, and voluntary. There would be no arguable basis to challenge Welz's pleas.

In his first response to the no-merit report, Welz attacks his pleas in two ways. First, he asserts that he never really intended to kill the woman, that he did not intimidate her concerning her statements to the authorities about the child abuse, and that he was entrapped by the informant and the State. He states: "I may have conspired to have [her] shot out of excited utterance [sic] but, I did not conspire to have her killed!" He urges this court to listen to recordings of his phone conversations from the jail to evaluate whether he ever used words like "kill" or "murder" and whether he intimidated the woman. Welz has not raised an issue of arguable merit. When he chose to enter his no-contest and guilty pleas, he gave up his opportunity to contest the charges against him and to raise the defense of entrapment. The trial court specifically discussed with Welz his right to have a trial and contest the facts, and Welz repeatedly told the trial court that he understood he was giving up those rights. Further, when the trial court asked Welz whether he was "admitting these charges today … of [his] own free will," Welz replied: "Right. That is correct." Finally, trial counsel made a point of stating that he and Welz had discussed entrapment as a defense and that trial counsel was confident Welz

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See ***State v. Douangmala***, 2002 WI 62, ¶21, 253 Wis. 2d 173, 646 N.W.2d 1 (explaining that § 971.08(1)(c) "'not only commands what the court must personally say to the defendant, but the language is bracketed by quotation marks, an unusual and significant legislative signal that the statute should be followed to the letter'") (citation omitted). In this case, the trial court paraphrased this statement. This does not provide a basis for plea withdrawal in this case. Even in cases where the warning is not given at all, a defendant is required to show "that the plea is likely to result in [his] deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). There is no indication in the record that Welz could make such a showing.

understood the rights outlined in the plea questionnaires. Having chosen to enter his no-contest and guilty pleas, Welz cannot now litigate his guilt for the offenses. Moreover, the words Welz said in person and in writing to the undercover detective and the woman, which are summarized in the criminal complaint, support the trial court's finding that there was a factual basis to support both pleas.[7]

The second way Welz attacks his pleas is by arguing that he "was not in [his] right frame of mind to take a plea bargain," in part because he had been in solitary confinement with limited visitors. Welz's response does not raise an issue of arguable merit. We have carefully examined the plea colloquy; it does not suggest Welz was confused or uncertain about his decision to accept the plea agreement. For instance, when asked whether he had enough time to talk to his attorney and whether the attorney had answered his questions, Welz replied affirmatively and added: "He did a good job." Welz's responses indicated he was fully engaged in the plea colloquy and he even offered a correction to the plea questionnaire, noting that he was still forty-nine years old, rather than fifty. Later, when asked whether he had been promised anything other than the plea agreement, Welz answered: "No. I have not been tricked or nothing like that, no." In short, nothing in the transcript leads us to conclude there would be any merit to asserting that the pleas were not knowingly, intelligently, and voluntarily entered.

[7] For instance, the criminal complaint indicates that Welz wrote a letter to the woman that stated: "You are going to have to … write out a statement saying we were arguing and [you] thought I was cheating on you…. You were just following someone else's lead when you heard someone say I broke [the child's] nose…. You did not mean it but you were angry at me and wanted to get even." The criminal complaint also indicates that Welz told the undercover detective how to get to the woman's house and instructed him to go there on Halloween, "go to the side door, ask for [the woman]," and shoot her "one time in the lower back."

Furthermore, we note that aside from raising the issue about the State's comments at sentencing, Welz did not seek to withdraw his pleas prior to sentencing. He entered his pleas on April 2, 2012, and was ultimately sentenced on August 24, 2012. During that intervening time, he spoke with the trial court about his desire to proceed with sentencing before the same trial court, rather than have the case transferred to another trial court as a remedy for the State's breach of the plea agreement. In his conversations with the trial court, Welz never mentioned any concerns about having entered his pleas.

Next, we consider the issue of the State's breach of the plea agreement at the first sentencing hearing. As noted, the parties agreed there had been a breach, so the key issue before the trial court was the proper remedy. "The choice of remedy is not up to the defendant; it rests with the court." ***State v. Howard***, 2001 WI App 137, ¶37, 246 Wis. 2d 475, 630 N.W.2d 244. Both this court and the United States Supreme Court have recognized there are two ways to remedy the government's breach of a plea agreement: (1) allow the defendant to withdraw his or her plea; and (2) specific performance of the plea agreement. ***Id.***, ¶¶32, 36-37 (referencing ***Santobello v. New York***, 404 U.S. 257 (1971)). "When selecting a remedy, sentencing courts should bear in mind that specific performance, the less extreme remedy, is preferred." ***Howard***, 246 Wis. 2d 475, ¶37.

Here, the trial court selected the less extreme remedy. *See* ***id.*** Neither Welz nor the State objected to that remedy and, in fact, Welz decided to have the case remain with the same trial court rather than have the case transferred to another trial court. The trial court's colloquy with Welz concerning that decision demonstrated that he considered his options and had elected not to proceed before a different judge. There would be no arguable merit to challenge the trial court's

resolution of the State's breach of the plea agreement or Welz's decision to have the same trial court conduct the sentencing hearing.

We turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentences were excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. Its extensive comments addressed Welz's prior criminal history, which included eleven adult convictions during a thirty-year period, including two burglary offenses, one armed burglary, one false imprisonment, one aggravated battery, and others. He was revoked six times while on release for those offenses, and also had a drug addiction. The trial court gave Welz credit for entering his pleas and not forcing the woman to have a trial, but it noted that Welz continued to contest

certain facts in the charges against him. The trial court expressed concern that Welz had been "in and out" of prison multiple times and continued to be revoked and commit new crimes. The trial court also discussed the crimes, recognizing that Welz had told the undercover detective to shoot the woman in the spine and make the crime look "drug-related." The trial court said "there needs to be a stopping point" to Welz's criminal behavior.

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the trial court's compliance with ***Gallion***. Further, there would be no merit to assert that the sentences were excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. The trial court could have imposed a total of forty-five years of initial confinement and twenty-five years of extended supervision. Its imposition of a total of fifteen years of initial confinement and fifteen years of extended supervision was well within the maximum total sentence and we discern no erroneous exercise of discretion. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

Finally, we note that in his second response, Welz states that according to the judgment of conviction, he is "to do a mandatory life sentence." That is incorrect. He was sentenced to a total of fifteen years of initial confinement and fifteen years of extended supervision. The judgment of conviction erroneously listed the severity of Welz's conspiracy crime as a Class A Felony, rather than a Class B Felony. *See* WIS. STAT. § 939.31 (2011-12) ("**Conspiracy**…. [F]or a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony."). The trial court corrected this error in August 2014 and an amended judgment of conviction was entered on August 28, 2014.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the amended judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Russell D. Bohach is relieved of further representation of Welz in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals